Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 60 OF 1991
ABDUL KADIR SULAIMAN J
28 OCTOBER 1993

Civil Procedure *— Summary judgment — Setting aside — Triable issues — Whether issues raised could be resolved by affidavit*

Contract *— Breach — Variation of contract — Whether agreement required to be in writing*

Contract *— Rescission — Whether rescission statute-barred depends on when cause of action arose*

The plaintiffs, owners of three lots of land ('the land'), entered into an agreement with the defendant to develop the land into a housing estate. The defendant was required, inter alia, to submit plans and drawings for approval and construct eight units of semi-detached houses for the plaintiffs, at the defendant's expense, within 18 months from the date of approval. For each of these obligations, time was of the essence. In the event of breach of any term, the party not in default was entitled to sue the other for specific performance and/or damages. The memoranda of transfer were registered by the plaintiffs in accordance with the agreement but they did not get the eight units of houses. The plaintiffs sued for, inter alia, rescission of the agreement and reconveyance of the land.

The defendant denied the breach and counterclaimed for the return of part of the consideration for the transfer, specific performance, damages and costs. The defendant pleaded: (i) breach on the part of the plaintiffs by requesting the defendant to hold on with the development as the prices of houses had fallen and the first plaintiff wanted to stay on to rear pigs for sale. The defendant contended that it was for this reason that the defendant did not submit building plans for approval so that work could be undertaken but conceded that written notice to vacate pursuant to the agreement had not been given; and (ii) that the claim was barred by limitation as the breach occurred in 1985, when the plaintiffs failed to vacate the said land despite the defendant's verbal request.

The plaintiffs applied for summary judgment for rescission or, alternatively, that the defence and counterclaim be struck out. The senior assistant registrar ('the SAR') entered summary judgment. The defendant has appealed.

Held, allowing the appeal and ordering that the suit proceed to trial:

(1) By the statement and conduct of the plaintiffs, the terms of the agreement were modified in the sense that the plaintiffs did not

want the project to carry on as yet and by implication would not want the defendant to proceed with the submission of building plans for approval. The issue to determine the reasons for the defendant not submitting the building plans could not be resolved by affidavit and could only be resolved at the trial of the action especially when the plaintiffs denied such an allegation.

(2) If there was intention to modify the terms of the agreement, the question of the plaintiffs having to vacate the land become irrelevant. As the agreement was not one which by law was required to be in writing, the purported oral statement of the plaintiffs to the defendant to hold on with the project constituted an important issue to be tried.

(3) Whether rescission was statute-barred depended on when the cause of action began to run. As the issues were in dispute, they could only be resolved at the full trial of the action and not by affidavit.

[Bahasa Malaysia summary

Plaintif, yang merupakan tuan punya tiga lot tanah ('tanah itu'), telah mengikat suatu perjanjian dengan defendan untuk memajukan tanah itu sebagai sebuah estet perumahan. Defendan dikehendaki, antara lain, untuk menyerahkan pelan dan lukisan untuk kelulusan dan membina lapan unit rumah kembar untuk plaintif, pada kos defendan, dalam masa 18 bulan dari tarikh kelulusan. Untuk setiap obligasi tersebut, masa adalah sangat penting. Jika sebarang terma perjanjian tersebut dimungkiri, pihak yang tidak ingkar berhak mendakwa pihak yang lain itu untuk pelaksanaan spesifik dan/atau ganti rugi. Memorandum pindahmilik telah didaftarkan oleh plaintif mengikut perjanjian tersebut tetapi mereka tidak mendapat lapan unit rumah itu. Plaintif telah mendakwa untuk, antara lain, pembatalan perjanjian tersebut serta pindahmilik semula tanah itu.

Defendan menafikan kemungkiran perjanjian itu dan menuntut balas untuk pemulangan sebahagian daripada balasan untuk pindahmilik itu, pelaksanaan spesifik, ganti rugi dan kos. Defendan membuat pli bahawa: (i) plaintif yang memungkiri perjanjian dengan meminta defendan menangguh kerja pembangunan kerana harga rumah telah jatuh dan plaintif pertama hendak terus tinggal di atas tanah itu untuk membela babi. Defendan menegaskan bahawa kerana sebab itulah defendan tidak menyerahkan pelan bangunan untuk kelulusan supaya kerja boleh dimulakan tetapi mengaku bahwa notis bertulis mengikut perjanjian tersebut tidak diberikan; dan (ii) tuntutan ini dihalang oleh had masa kerana pecah mungkir itu telah berlaku pada tahun 1985, apabila plaintif gagal mengosongkan tanah itu walaupun diminta secara lisan oleh defendan.

Plaintif telah memohon penghakiman terus untuk membatalkan perjanjian tersebut atau, secara alternatif, untuk pembelaan dan tuntutan balas dibatalkan. Penolong kanan pendaftar ('PKP') telah memasukkan penghakiman terus. Defendan telah membuat rayuan.

Diputuskan, membenarkan rayuan dan memerintahkan supaya kes ini diteruskan untuk perbicaraan penuh:

(1) Melalui kenyataan dan kelakuan plaintif, terma pernjanjian tersebut telah diubahsuai, iaitu plaintif tidak ingin projek itu dimulakan lagi dan melalui implikasi tidak menghendaki defendan menyerahkan pelan bangunan untuk kelulusan. Isu untuk menentukan sebab mengapa defendan tidak menyerahkan pelan bangunan untuk kelulusan tidak boleh diputuskan melalui afidavit dan hanya boleh diselesaikan pada perbicaraan penuh tindakan ini, terutamanya kerana plaintif menafikan tuduhan defendan.

(2) Jika terdapat tujuan untuk mengubahsuai terma perjanjian tersebut, soal mengenai plaintif mengosongkan tanah itu tidak relevan. Memandangkan bahawa perjanjian itu tidak merupakan suatu perjanjian yang dikehendaki dalam bentuk bertulis di sisi undang-undang, kenyataan lisan plaintif kepada defendan supaya menangguhkan projek itu merupakan suatu isu penting untuk dibicarakan.

(3) Sama ada pembatalan perjanjian itu dihadkan oleh statut bergantung kepada masa bila kausa tindakan itu bermula. Oleh kerana isu itu dipertikaikan, ia hanya boleh diselesaikan pada perbicaraan penuh tindakan itu dan bukan melalui afidavit.]

Notes

For cases on variation of contracts, see 3 *Mallal's Digest* (4th Ed) paras 866–868.

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2287–2293.

Cases referred to

1 *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (refd)

2 *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (refd)

Ernest Chua (*Ernest Chua & Co*) for the defendant.

P Phang (*Reddi & Co*) for the plaintiff.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an appeal by the defendant against the decision of the learned senior assistant registrar ('the SAR') given in favour of the plaintiffs in their application under O 81, O 18 r 19(1)(b) and (c) or (d) and O 92 r 4 of the Rules of the High Court 1980 ('the RHC'). Briefly, the facts are that the plaintiffs, the landowners, owned between them three contiguous lots ('the said land') and intended the said land to be developed into a housing estate. The first plaintiff was the registered proprietor and beneficial owner of two parcels of land situated at 5th mile, Jalan Penrissen, Kuching, Sarawak containing areas of

3,925sq m and 4,128sq m, more or less described as Lots 604 and 605 both in Block 226, Kuching North Land District, respectively. The second plaintiff was the registered proprietor and beneficial owner of Lot 603 containing an area of 7,932sq m, more or less, situated thereat. On 16 March 1983, they entered into an agreement ('the said agreement') with the defendant as a developer. Preamble (b) to the said agreement recites that the plaintiffs and the defendant were desirous of developing the said land into a housing estate ('the development project') consisting of various types of residential houses. Under the agreement, the plaintiffs were to be entitled to eight units (four units each) of the houses to be built by the defendant on the said land ('the plaintiffs' houses'). In carrying out the development project, cl 2 of the said agreement provided the various obligations of the defendant, of which time is of the essence. Inter alia, the defendant was required to prepare and submit for approval by the authorities the subdivision plans, building drawings and specifications and engineering drawings. The defendant was also required to construct and complete all the reinforced concrete ('RC') buildings on the said land in a good workmanlike manner and in accordance with the building drawings and specifications approved by the authority concerned. It was also required to carry out the construction and completion of all infrastructure (eg tarmac roads, culverts, drains, sewage system, bridges, retaining walls, etc) pertaining or relating thereto in accordance with drawings and specifications as may be approved by the authority concerned. By cll 9, 10 and 11, the defendant shall, at its own cost and expense construct the plaintiffs' houses in strict compliance with the approved building drawings and specifications, to be completed within 18 months from the date of approval by the authority of the building plans and RC details. For this purpose, completion means when occupation permits thereto are issued by the local authority. In the event of delay on the part of the defendant, it shall pay to the plaintiffs monthly delay compensation at the rate of RM300 per month per unit which would work out to be RM2,400 for the eight units of the plaintiffs' houses. The arrangement as provided in cl 4 was that upon the execution of the said agreement, the plaintiffs shall forthwith execute valid memoranda of transfer of the said land in favour of the landowners (sic) and the total consideration to be stated in the transfer shall be RM1,185,000. As for the plaintiffs, apart from the eight units to be allotted to them by the scheme, they were to be entitled to a further sum of RM105,000 to be paid by the defendant 'by way of equality of exchange' of the said land. Consequently, three memoranda of transfer were registered as Instrument Nos L6008/1983, L6009/1983 and L6049/1983 transferring the said land of the plaintiffs to the defendant pursuant to the said agreement.

Clause 15 provides that the defendant shall sell two of the eight units of the plaintiffs' houses for and on their behalf at no less than RM135,000 per unit and all proceeds of sale therefrom shall belong absolutely to the plaintiffs.

Clauses 4 and 5 of the said agreement provide the time frame for the defendant to submit matters for the approval of the competent authority as follows:

(a) within two months from date of the registration of the memoranda of transfer under cl 14, to submit the appropriate applications for amalgamation and subdivision of the said land for house lots;
(b) within six calendar months from the date of approval of subdivision and mutation in principle, to submit the necessary engineering plans for the said land; and
(c) within six calendar months from the date of approval of the said engineering plans, to submit the building plans [and] specifications.

Clause 7(A) requires the plaintiffs to deliver vacant possession of the said land to the defendant within one calendar month from the date of written notice from the defendant to them stating that the approval of road and engineering plans for development of the said land had been obtained from the competent approving authority.

Clause 17 provides that in the event of any of the parties committing any breach of or failing to comply with any of the terms or conditions of the said agreement, the party not in default shall, without prejudice to his right to claim for damages for breach of contract, be entitled to sue for specific performance against the party in default.

The plaintiffs, having parted with the said land, did not get the eight units of houses as provided for in the said agreement. On 27 May 1991, they filed a suit against the defendant praying for the rescission of the said agreement, for the defendant at its own cost and expense, to reconvey or retransfer the said land to the plaintiffs, free from encumbrances including the charge created by the defendant over the said land, damages and costs, alleging breach of the said agreement by the defendant. The defendant filed its defence and counterclaim. In its defence, it denied the breach and instead alleged breach on the part of the plaintiffs and also pleaded limitation against the plaintiffs' claim. The alleged breach committed by the plaintiffs, according to the defendant, was that when the engineering plans were approved on 28 February 1985, it informed the plaintiffs to vacate the said land so that it could start work on the said land but the plaintiffs requested the defendant to hold on as, at that time, the prices of houses had fallen and were not as good as the prices in 1983. Moreover, the first plaintiff requested for more time to stay so that he could continue rearing pigs for sale. It was for that reason, alleged the defendant, that it did not proceed with the submission of the building plans as there was no point in doing so. Because of the plaintiffs' alleged breach, it counterclaimed for a refund of the sum of RM105,000 from the plaintiffs being the cash sum paid to them being part of the consideration for the transfer of the said land to it by the plaintiffs, alternatively, for specific performance of the said agreement, and damages for breach and costs. In their reply, the plaintiffs denied their alleged breach and maintained that they were not barred by limitation.

On 3 October 1991, the plaintiffs applied by summons-in-chambers for orders pursuant to O 14 r 1, O 18 r 19(1)(b) and (c) or (d) and O 92 r 4 of the RHC.

This summons was subsequently amended by an order of court dated 28 July 1992. By their amended summons-in-chambers, the plaintiffs applied under O 81, O 18 r 19(1)(b) and (c) or (d) and O 92 r 4 of the RHC:

(a) for summary judgment to be entered against the defendant in terms as prayed for in the statement of claim; or alternatively
(b) for the defence and/or counterclaim dated 8 July 1991 to be struck out and that judgment in terms as prayed for in the statement of claim be entered against the defendant;
(c) that the defendant do pay costs of and incidental to this application; and
(d) any other relief or order as the court may deem fit and just in the circumstances of the case.

It is to be noted that no application under O 18 r 19(1)(a) of the RHC that the defendant's pleadings be struck out on the ground that it disclosed no reasonable defence, was made. It is to be noted also that one of the orders sought for in the claim of the plaintiffs was for a rescission of the said agreement. The ground for wanting the order for rescission was that the defendant had no defence to the claim and not on the ground that the contract was void ab initio on grounds of fraud, misrepresentation, etc. The grounds of the application were:

(a) that the defendant has no defence to the action or any part thereof;
(b) that the defence and counterclaim of the defendant were frivolous, vexatious and were calculated to delay the fair trial of the action and an abuse of the process of court; and
(c) based on the grounds set forth in the affidavit of the plaintiffs affirmed on 3 October 1991.

Perusing the grounds set forth in the said affidavit of the plaintiffs revealed that:

(a) the defendant was to complete eight units of semi-detached houses for the plaintiffs within 18 months from the date of approval of the building plans and RC details by the appropriate authorities;
(b) the consideration stipulated in the memoranda of transfer of the said land to the defendant was never paid;
(c) the defendant had caused the said land to be charged to the Hongkong & Shanghai Banking Corp Ltd;
(d) the building plan for the said houses have not even been submitted to the Kuching Rural District Council ('KRDC') for approval;
(e) the defendant never gave the plaintiffs any notice pursuant to cl 7(A) read with cl 21(a) of the said agreement to vacate the said land or any part;
(f) at the end of 1990, the director of the defendant verbally informed the plaintiffs that the defendant was unable to carry out the terms of the said agreement; and
(g) the defendant had not treated the agreement as repudiated, hence the plaintiffs' claim was not statute-barred.

By praying in the alternative in respect of prayers (a) and (b) as mentioned in para 8 of this judgment, the plaintiffs were in effect praying for orders either under prayer (a) for summary judgment under O 81 of the RHC for

A the rescission of the said agreement on the ground that the defendant has no defence to the action, or under prayer (b) for the striking out of the defendant's defence and counterclaim under O 18 r 19(1)(b) and (c) or (d) of the RHC and for an order that judgment be entered accordingly. As regards prayer (a) for summary judgment under O 81, this was confirmed by the learned counsel for the plaintiffs in her written submission dated B 20 May 1993 handed in during the hearing of this appeal. As stated in the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*,[1] when an application is made under O 81 by the plaintiff, no defence need be filed by the defendant. This is so because by r 1(2), an application may be made against a defendant under this rule whether or not he has entered an C appearance in the action. However, in this case, the defence was in fact filed on 8 July 1991, long before the application by the plaintiff dated 3 October 1991.

The SAR heard the application by the plaintiffs and entered summary judgment against the defendant by:

D (a) ordering the rescission of the said agreement;
(b) ordering the defendant at its own cost and expense to reconvey or retransfer the said land to the plaintiffs; and
(c) ordering the defendant at its own cost to pay the plaintiffs damages to be assessed, and costs to the plaintiffs, to be taxed unless agreed.

E The SAR, however, did not make any order in respect of the application by the plaintiffs for the defence and/or counterclaim dated 8 July 1991 to be struck out. In her judgment, she held that since the prayer for the striking out of the defence and counterclaim is in the alternative and since she had made the decision for summary judgment, she did not make any order regarding the defence and counterclaim. The defendant, being dissatisfied, F now appeals against the said decision giving the summary judgment to the plaintiffs. The plaintiffs, however, did not appeal against the non-order made by the SAR over their applications for the striking out of the defence and/or counterclaim of the defendant. This is confirmed by the learned counsel for the plaintiffs in her submission that she conceded that the G counterclaim remains and that no appeal was made by the plaintiffs against the SAR making no order or decision as regards the defendant's counterclaim. She contends that the plaintiffs did not appeal because the prayer was in the alternative and the SAR had granted prayer (a) for summary judgment only. However, she submitted that even though the counterclaim by the defendant remains and if the plaintiffs succeed on summary judgment, that H summary judgment need not automatically be stayed pending the disposal of the counterclaim of the defendant. Thus, the effect of the decision of the SAR is that she left the application by the plaintiffs under O 18 of the RHC untouched. Since there is no counter-appeal by the plaintiffs over their application under O 18, this appeal before me will proceed only against the I decision of the SAR in making the order pursuant to O 81 of the RHC. The notice of appeal by the defendant is confined only to the order made by the SAR. Though an appeal under O 56 r 1 of the RHC is by way of rehearing, the appellate court is not to be concerned with any matter not appealed against.

An application by a plaintiff under O 81 of the RHC is similar to an application under O 14 for a summary judgment on the ground that the defendant has no defence. It is established law that the court would exercise its discretion for summary judgment only in plain and obvious cases, ie that there is no bona fide defence. But if the defendant satisfies the court in such an application by the plaintiff that there is a triable issue in the matter, summary judgment will not be given to the plaintiff. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. See *Bank Negara Malaysia v Mohd Ismail & Ors*,[2] a decision on O 14 where the principle, in my view, is equally applicable to O 81 of the RHC. At p 408 in *Mohd Ismail*'s case,[2] Mohamed Azmi SCJ (delivering the majority judgment of the court) had this to say:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
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> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v Casey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516).

In *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*[1] at p 390, Lee Hun Hoe CJ (Borneo) had this to say on an O 81 application for summary judgment:

> The summary jurisdiction conferred by O 81 must be used with great care. It provides a procedure similar to O 14. Where all the issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial.

The application by the plaintiffs before the SAR is supported by the joint affidavits of the plaintiffs affirmed on 3 October 1991 (the plaintiffs' first affidavit) and another joint affidavit-in-reply affirmed on 21 February 1992 (the plaintiffs' second affidavit). The defendant filed an affidavit in opposition, affirmed by Chua Sian Liang, its secretary, on 6 November 1991 (the defendant's first affidavit) and a further affidavit-in-opposition

affirmed by the same secretary on 22 April 1992 (the defendant's second affidavit).

Paragraphs 6, 7, 8, 10 and 11, respectively of the statement of claim of the plaintiffs state:

> (6) Since the execution of the said agreement, the defendant has failed neglected or refused to carry out the development of the said land and had not, to the knowledge of the plaintiffs, submitted any subdivision, engineering or building plans to the competent authorities, in connection with the proposed development of the said land and/or required under the terms of the agreement pleaded hereinabove.
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> (7) The defendant has been in breach of the said agreement.
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> (8) Despite repeated requests, reminders and appeals to the defendant, the defendant has failed, neglected or refused to perform its obligations under the said agreement.
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> (10) Since the said land was transferred to the defendant for the purposes of the development thereof, and as the defendant failed to carry out the development thereof, the same should be reconveyed to the plaintiffs.
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> (11) In the premises, the plaintiffs claim against the defendant for:
>
> (a) an order that the said agreement be rescinded;
>
> ...

Paragraphs 5, 6, 8 and 9 of the defence of the defendant state:

> (5) Paragraphs 6, 7 and 8 of the statement of claim are denied. The defendant will say that the plaintiffs were kept informed of each step of action taken by the defendant, such as that the application for amalgamation and subdivision was submitted to the Land and Survey [Department] on 14 July 1983, that it was approved in principle on 17 November 1983, that the engineering plan was submitted to the Kuching Rural District Council ('KRDC') on 23 May 1984 and that such engineering plan was approved by the KRDC on 28 February 1985. All these matters were related to the plaintiffs, albeit not in writing.
>
> (6) Further, the defendant will say that if at all there was any breach of the agreement (which is denied) it was not on the part of the defendant but that of the plaintiffs. When the engineering plan was approved by the KRDC on 28 February 1985, the defendant duly informed the plaintiffs to vacate the said land so that the defendant could start on the said land but the plaintiffs requested the defendant to hold on as at that time the prices of houses had fallen and [were] not as good as the prices in 1983. Moreover, the first plaintiff, as occupier of Lot 605, told the defendant to give him more time to stay on so that he could continue rearing pigs for sale, hoping that the prices of semi-detached houses could go up in a few years time. It is for those reasons that the defendant did not proceed with the submission of the building plans to the relevant authorities as there was no point in doing so then. The occupier of Lot 604, the plaintiffs' sister, however vacated the said house built on that lot, leaving the plaintiffs occupying Lots 603 and 605.
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> (8) Paragraph 10 of the statement of claim is denied. The defendant will say that despite the plaintiffs' breach of agreement, the defendant is still willing and able to develop the said land into a housing estate if the plaintiffs could vacate the said land to enable the defendant to carry out such works as levelling and construction of drains and culverts as the engineering plan had

already been approved by the relevant authority. In the premises, the defendant will plead that the question of reconveying the said land to the plaintiffs does not arise as the defendant is entitled to specific performance of the said agreement.

(9) The defendant will plead that para 11 of the statement of claim is misconstrued as the plaintiffs are not entitled to rescind the said agreement as the sum of RM105,000 as consideration for the said land had been paid to the plaintiffs and the defendant had dutifully carried out his obligations. If (which is denied) the plaintiffs were entitled to rescind the said agreement, the defendant will plead that such rescission is now statute-barred by the Limitation Ordinance of Sarawak (Cap 49) as the plaintiffs had failed to institute legal proceedings for rescission of the said agreement within the statutory period of three years as specified under col 91 in the schedule to the Limitation Ordinance of Sarawak (Cap 49). Hence, for this reason alone, the defendant will plead that the plaintiffs' suit ought to be dismissed pursuant to s 3 of the Limitation Ordinance of Sarawak (Cap 49).

Coming now to the affidavits filed by the parties in this application of the plaintiffs before the SAR, the first affidavit of the plaintiffs, inter alia, contained as follows:

...

(5) By cl 11 of the agreement, the developer was to complete for us eight units of semi-detached houses (hereinafter referred to as 'the houses') within 18 months from date of approval of the 'building plans and RC details' by the appropriate authorities.

...

(9) To the best of our knowledge, information and belief, the building plans for the said houses had not even been submitted to the Kuching Rural District Council, being the local authority having jurisdiction over the said land for approval.

(10) The defendant never gave us any notice pursuant to cl 7(A) read with cl 21(a) of the said agreement, to vacate the said land or any part.

...

(13) We were not aware that the defendant was not going to perform the agreement until the defendant's said director verbally informed us at the end of last year that the defendant was unable to carry out the terms of the agreement.

...

(15) As such, our claim herein is not statute-barred by virtue of the Limitation Ordinance of Sarawak (Cap 49).

The first affidavit-in-opposition of the defendant, inter alia, contained as follows:

(3) As regards paras 4 and 5 of the said affidavit the defendant will say that pursuant to cl 2(a), read with cl 4 of the said agreement, the defendant duly submitted to the relevant authority an application for amalgamation and subdivision of the said land. A copy of the defendant's letter dated 14 July 1983 to that effect is now shown to me and exhibited hereto marked CSL1. As such, the defendant will say that it has duly performed its obligations under the said agreement.

(4) Further, the defendant will say that after the Land and Survey Department had approved in principle the defendant's application for amalgamation and subdivision of the said land in November 1983, the defendant, pursuant to

A cl 5(a) of the said agreement, submitted three sets of engineering plans in respect of the said land to the Land and Survey Department for consideration and approval. A copy of a letter dated 23 May 1984 to that effect is now shown to me and exhibited hereto marked as CSL2.

(5) On or about 28 February 1985, the defendant was duly informed by the Land and Survey Department that the engineering plans submitted by the B defendant on 23 May 1984 had been approved. A copy of the letter dated 28 February 1985 from the superintendent, Land and Survey Department, First Division, is now shown to me and exhibited hereto marked CSL3.

(6) Soon after the defendant had received the approval of the engineering plans from the Land and Survey Department, I approached the plaintiffs personally to inform them of the same and asked them to vacate the said land so that C the defendant could carry on with the development of the said land, such as levelling and earth-filling of the said land. But to the defendant's surprise, the plaintiffs requested the defendant to hold on with the project for the reasons stated in para 6 of the defence dated 8 July 1991 filed herein. The defendant accordingly obliged and hence did not proceed with the submission of the building plans as there was no point in doing so. In the premises, the D defendant will say that the plaintiffs were in breach of cl 7(A) of the agreement and that cll 5(b) and 11 of the said agreement were effectively rendered inoperative by the plaintiffs.

...

(9) I respectfully crave leave to refer to para 9 of the affidavit. As explained under para 6 hereof, there was no point in submitting any building plans to E the KRDC as no infrastructural works had been carried out. The defendant will further aver that if the plaintiffs had not requested the defendant to hold on with the project and had vacated the said land, the defendant would have carried out the infrastructural works according to the approved engineering plans and would also have duly submitted the building plans to the approving authority.

F (10) Paragraph 10 of the affidavit is denied. I will aver that, albeit written notice was not given, I personally went to see the plaintiffs in their house soon after the defendant had received the letter of approval marked CSL3 to inform them that the authority had approved the defendant's engineering plans. I also requested them to vacate the house as soon as possible so that the defendant could carry on with the levelling and earth-filling works on the G said land. However, for the reasons stated in para 6 of the defence, the plaintiffs requested the defendant to hold on with the project. The plaintiffs' sister, occupier of Lot 604 however moved out of the house subsequent to my visit.

The second affidavit of the plaintiffs, inter alia, contained as follows:

H (3) We have never been informed of any application by the defendant for amalgamation and subdivision of the land in question or the submission of any engineering plans by the defendant.

(4) The documents exhibited as CSL1 and CSL2 and CSL3 of the affidavit-in-opposition were never shown to us by the defendant prior to the commencement of this action.

I The second affidavit-in-opposition of the defendant, inter alia, contained as follows:

(4) I deny paras 3 and 4 of the said affidavit-in-reply and wish to say that about two weeks prior to the submission of the application for amalgamation and

subdivision of the said land, that is, on or about 3 July 1983 (which was a Sunday), I visited the plaintiffs and showed to them a copy of the layout plan. A copy of the said layout plan that had been shown to the plaintiffs is now produced to me and exhibited hereto marked CSL4.

(5) I will further aver that on or about 29 April 1984, that is, on a Sunday, I visited the plaintiffs and showed them a copy of a levelling plan which was drawn up by the defendant prior to drawing up the engineering plans. A copy of the levelling plan which was shown to the plaintiffs on or about 29 April 1984 is now produced to me and exhibited hereto marked as exh CSL5.

(6) A few days before I submitted the engineering plans to the Land and Survey Department vide our letter dated 23 May 1984 (marked as exh CSL2), I visited the plaintiffs to show them a copy of the engineering plans. That visit to the plaintiffs was on a Sunday, on or about 20 May 1984. A copy of the engineering plans that had been shown to the plaintiffs before I submitted it to the Land and Survey Department is now produced to me and exhibited hereto marked CSL6.

(7) A few days after the defendant had received a letter of approval of the engineering plans dated 28 February 1985 and exhibited as CSL3, I personally went to see the plaintiffs on Sunday, 3 March 1985, to tell them of such approval and to show them the said letter from the Land and Survey Department. On that day, I also requested the plaintiffs to vacate the house as soon as possible so that the defendant could carry on with the levelling and earth-filling works on the said land. In the premises, para 5 of the said affidavit-in-reply is denied.

(8) In view of the matters aforesaid, I am advised and I verily believe that the defendant had performed its obligations under the agreement and that it was the plaintiffs who had breached the agreement.

Thus looking at the pleadings and the affidavits filed by the parties, the root of the problem started with the plaintiffs remaining on the said land and the defendant did not submit the building plans for approval to enable the development project to continue as envisaged by the said agreement. The plaintiffs did not vacate the said land to enable the defendant to take vacant possession thereof pursuant to cl 7(A) of the said agreement on the ground that no written notice to do so was ever given to them by the defendant. This is conceded to by the learned counsel for the defendant who submitted that only verbal notice was given and that would suffice. On the issue of submission of the building plans, it was also conceded on behalf of the defendant but for reason stated in the affidavit. In the circumstances, the plaintiffs say that the defendant was in breach of the said agreement for not proceeding to submit the building plans for approval hence the development project failed. The defendant, on the other hand, says that it was the plaintiffs who were in breach for failing to vacate the land thereby disabling them from proceeding further with the project. Up to the date of the filing of the action for rescission by the plaintiffs, the defendant says that more than three years has elapsed since the cause of action commenced. The plaintiffs, on the other hand, say that they are within time as they became aware of the defendant's refusal to carry on with the project only towards the end of 1990. On these facts, the question to decide is whether the defendant has any defence to the action filed by the plaintiffs.

The SAR, in deciding the application of the plaintiffs for summary judgment against the defendant, addressed her mind to the two issues. On the first issue, she held that the defendant had failed to fulfil its obligation under cl 2(b)–(h) of the agreement. The failure of the defendant to give written notice to the plaintiffs pursuant to cl 7(A) of the said agreement exonerated the plaintiffs from any blame. An oral notice to vacate is inadmissible under s 92 of the Evidence Act 1950. As such the agreement was rescinded under s 40 of the Contracts Act 1950 and the plaintiffs were entitled to claim for damages under s 75 (sic), s 76 of the Contracts Act 1950 and to the return of the said land under s 66 thereof. On the second issue, she accepted that there was a grave dispute between the plaintiffs and the defendant as to the date when the plaintiffs could treat the contract as rescinded, ie the date when the cause of action began to run. She found the catalyst to their trouble in the defendant's failure to give the said written notice whereby the plaintiffs were at liberty to set their own time as to when their cause of action would arise as all future obligations of both parties were contingent upon this notice being sent. The fact that it was not sent means that the plaintiffs had every right to sit and wait for it. The plaintiffs waited until the letter of demand was sent to the defendant on 4 July 1991. This letter of demand referred to by the SAR is exh C to the plaintiffs' first affidavit. Incidentally, the said exhibit was dated 4 April 1991 and not 4 July 1991. This letter was from the counsel for the plaintiffs to the defendant giving the defendant, 21 days from the date thereof to reconvey the said lands to the plaintiffs. So according to her, the cause of action began to run not from the date the defendant verbally informed the plaintiffs to vacate, around 3 March 1985, but the date as alleged by the plaintiffs, ie at the end of 1990, and therefore the action by the plaintiffs was not statute-barred. Hence, the defendant had failed to raise any triable issues and therefore, judgment against the defendant was entered in terms prayed for in the minutes of the judgment with costs to the plaintiffs to be taxed unless agreed.

The question to decide is whether the defendant by the said defence and the affidavit-in-opposition has satisfied the court that it has a bona fide arguable defence which ought to be tried. The SAR did not accept this allegation of the defendant as an oral notice to vacate is inadmissible under s 92 of the Evidence Act 1950 and not in compliance with cl 7(A) of the said agreement which requires a written notice. However, she failed to consider whether if what the defendant alleges is true in explaining the reason as to why it did not proceed to submit the building plans for approval as required under the said agreement, then that oral statement by the plaintiffs asking the defendant to hold on with the development project amounted to a modification of the contractual term by the plaintiffs, thereby suspending the defendant from having to comply with the terms of cl 5(b) of the said agreement in requiring the submission by the defendant of the building plans and specification to the authority for approval within six calendar months from the date of the approval of the engineering plans. If it so modified the contract, though not in writing, it would be admissible under proviso (d) to s 92 of the Evidence Act 1950. By the statement and

conduct of the plaintiffs, the terms of the said agreement would be modified in the sense that the plaintiffs would not want the project to carry on as yet for the reason alleged to have been given to the defendant and that by implication would not want the defendant to proceed with the submission of the building plans for approval as yet. For once the approval was obtained, the physical development of the project would then commence. The plaintiffs did not want this to happen as yet for the reasons explained by the defendant. This issue to determine the reason for not submitting the building plans by the defendant as scheduled cannot be resolved by affidavit evidence alone and this issue can be resolved only at the trial of the action. So this issue is a triable one more so when the plaintiffs by their affidavit deny such an allegation by the defendant. The issue of cl 7(A) of the said agreement would not as yet arise for if there was intention to modify the terms of the said agreement, the question of the plaintiffs having to vacate becomes irrelevant. The learned counsel for the plaintiffs submitted that proviso (d) to s 92 does not apply because the said agreement was duly stamped and registered according to the law as to registration of documents, ie the Hire Purchase Registration Ordinance of Sarawak (Cap 71) ('the Ordinance'). I see no merit in the submissions because, firstly, the said agreement is not a hire-purchase agreement. Even if it is a hire-purchase agreement, it is not in respect of movable property and further, that the agreement was not registered by the authority having power to register the agreement under the Ordinance. Counsel says the registration was done pursuant to s 5 of the Ordinance. For the reason given, despite the wide scope provided by s 5, I would not consider the words 'any document' therein mentioned would mean any document whatsoever. It must mean any document having to do with hire-purchase. In any event, even if I am wrong in giving the interpretation, the registration under s 5 in this case, for the reason I stated earlier, was not done in accordance 'to the law in force for the time being as to registration of documents' spelt out by proviso (d) to s 92 of the Evidence Act 1950. It is not in dispute that the said agreement is not one which is by law required to be in writing. In the circumstances, the purported oral statement of the plaintiffs to the defendant, as stated in para 6 of both the defence and the first affidavit-in-opposition of the defendant, constitutes an important issue to be tried. Thus, the defence of the defendant on this ground cannot be brushed aside without the matter going for trial.

Another defence put up by the defendant is that the action by the plaintiffs for the rescission of the said agreement is statute-barred. To decide whether or not it is statute-barred, depends on when the cause of action began to run. The defendant says it was from 3 March 1985 as stated in para 7 of its second affidavit-in-opposition but the plaintiffs say it was from the end of 1990 as shown at para 13 of their first affidavit in support of this application. According to the submission by the learned counsel for the plaintiffs, the breach of the said agreement alleged against the defendant is for failure to get the building plans approved and failure to complete the houses within 18 months from the date of approval of the building plans. The submission by the learned counsel for the defendant, on the other hand, was to the effect that the defendant was not in breach because it was

A asked not to proceed with the next course of obligation under the agreement, ie the approval of the building plans. The plaintiffs wanted to stay on the said land longer to wait for the price of houses to rise. To my mind, this is a serious question to be tried. The three memoranda of transfer of the said land were registered in the third week of May 1983. See exhs B1, B2 and B3 to the first affidavit of the plaintiffs. Clause 4 of the said agreement B required the submission of applications for amalgamation and subdivision of the said land within two months from the date of registration of the memoranda. If this was not done by the defendant, the cause of action for the breach would have arisen around July 1983. The defendant has tendered as evidence that it had done so by a letter dated 14 July 1983: see exh CSL1. C Of course, the plaintiffs deny knowledge of the defendant's action. The said agreement made no mention that such action by the defendant needs to be notified to the plaintiffs. Clause 5(a) requires the defendant to submit the engineering plans within six calendar months from the date of approval of subdivision and mutation. Exhibit CSL2 of the defendant shows that it was done on 23 May 1984. Exhibit CSL3, dated 28 February 1985, is the D approval of the engineering plans given by the authority. Clause 5(b) of the said agreement requires the defendant to submit the building plans and specifications for approval within six calendar months from the date of approval of the engineering plans. It was this step of the obligation of the defendant under the said agreement that was not done. Naturally without E the building plans and specifications approved, the building of houses cannot take place. On the evidence available in CSL3, the cause of action would appear to begin to run six months after such approval of the engineering plans was given. But these issues are in dispute. It can be resolved only at the full trial of the action and affidavit evidence alone would not help to resolve the issue.

F So for the reasons given, the SAR was wrong in granting the summary judgment to the plaintiffs on their application under O 81 of the RHC where triable issues are involved. I therefore set aside the order, dismiss the application of the plaintiffs, and order that the suit shall proceed to trial. Costs of the appeal and court below to the appellant to be taxed unless G agreed.

Appeal allowed.

Reported by Elizabeth Verghis

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